No. 06-1060

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

ROBERT SANFORD DIETRICH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court hear a challenge to the availability of equitable tolling in federal habeas corpus cases when the State never presented the issue in the district or circuit court, raises it for the first time in the petition for certiorari, and when his current argument conflicts with the position he advanced in the lower court?

2. Should this Court accept review of an unpublished circuit decision that ordered a remand, when the petitioner's contentions about the decision's impact are wrong?

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REASONS FOR DENYING THE WRIT

I. THE STATUTE OF LIMITATIONS IS SUBJECT TO EQUITABLE TOLLING.

A. The Question whether a Habeas Corpus Petition Filed Subsequent to the Enactment of the AEDPA is Subject to Equitable Tolling was Never Raised Below and Has, Therefore, Been Waived.

For the first time in nearly six years, petitioner argues that equitable tolling does not exist under the AEDPA. (Cert. Petition, pp. 11-14). Robert Dietrich filed his *pro se* habeas

corpus petition in April 2001. With leave of court, appointed counsel filed an Amended petition in June 2002. Fifteen months later, on September 25, 2003, petitioner, filed his Answer and Response. (S.E.R. 50).[1] In his Response, petitioner never argued that equitable tolling was unavailable under 28 U.S.C. § 2244(d). Instead, petitioner argued that tolling should be denied because the "negligence" of state post-conviction counsel "is not an 'extraordinary circumstance' justifying equitable tolling." (S.E.R. 50). In a subsequent memorandum, filed in April 2004, petitioner again raised no categorical challenge.

In September 2004, the Magistrate Judge rejected Dietrich's tolling arguments. (App. 1-7). He first rejected statutory tolling, and then found that: "A more appropriate analysis, and one which allows for any potential extraordinary factors, is whether the time that elapsed should be equitably tolled." (App. 5). However, the Magistrate found that Dietrich had "not alleged facts which would warrant equitable tolling. . . ." (*Id*).

Petitioner's response to Dietrich's objections *endorsed* the Court's analysis:

> *The court's Findings and Recommendation dated September 9, 2004, are correct and should be adopted in their entirety.* Respondent continues to rely on his previously submitted Exhibits and Memoranda for arguments on this issue.

(Respondent's Appendix A) (emphasis added).

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[1] "S.E.R." refers to the Appellee's Supplemental Excerpt of Record that petitioner filed in the Ninth Circuit. "App" refers to the Appendix to petitioner's Petition for Writ of Certiorari filed in this Court.

Consistent with his district court pleadings, petitioner never raised any such challenge in his Ninth Circuit brief. Instead, petitioner again accepted the availability of equitable tolling but argued against its application in Dietrich's case because of an insufficient showing to warrant the doctrine's invocation. Petitioner framed the issue as follows: "Is equitable tolling of the statute of limitations in 28 U.S.C. §2244(d)(1) required when petitioner failed to timely file a petition for Oregon Supreme Court review of an order by the Oregon Court of Appeals summarily affirming the denial of petitioner's state post-conviction relief petition?" (Appellees' Brief, at 1). Petitioner then summarized his argument this way: "[T]he district court did not err in refusing to equitably toll the statute of limitations during the disputed period of time. Petitioner failed to prove that he had been diligently pursuing his rights or that his state post-conviction relief attorney's alleged negligence was sufficiently egregious to constitute an 'extraordinary circumstance' justifying equitable tolling of the federal statute of limitations." (Appellee's Brief. p.9).

In 2006, the Circuit remanded for a hearing on equitable tolling. (App. 11-16).

Now, in 2007, petitioner's argument challenging the availability of equitable tolling makes its first appearance in his petition for certiorari. But, in 2004, petitioner accepted the availability of equitable tolling. Thus, his current argument contradicts his own argument before the district court. Accordingly, this Court should reject petitioner's inconsistent and untimely attempt to circumvent preservation doctrine. *See Baldwin v. Reese*, 541 U.S. 27, 33-34 (2004) (deeming habeas corpus petitioner's argument waived under Sup. Ct. Rule

15.2 as it "first made its appearance in this Court,"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, n.4 (2002) ("Brunswick has asserted that federal maritime law governs this case. Because this argument was not raised below, it is waived."); *Roberts v. Galen of VA, Inc.*, 525 U.S. 249, 253-254 (1999) (per curiam) ("these claims do not appear to have been sufficiently developed below for us to assess them"). *See also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'") (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8 (2000)).

B. The AEDPA Statute of Limitations is Subject to Equitable Tolling.

In the federal courts of appeal, it is settled that the statute of limitations is subject to equitable tolling. *See* Advisory Committee Notes to Rule 3 of the Rules Governing Section 2254 Cases in the United States Courts ("Although the rule does not address the issue, every circuit that has addressed the issue has taken the position that equitable tolling of the statute of limitations is available in appropriate circumstances . . . .") (citations omitted).

Petitioner cannot cite one circuit decision holding that equitable tolling is unavailable under the AEDPA. (Cert. Petition, pp. 11-14). Petitioner does cite *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999), in which the Seventh Circuit questioned the availability of equitable tolling. The Seventh Circuit has since stated that equitable tolling *is* available under 28 U.S.C. § 2255. *See United States v. Marcello*, 212 F.3d 1005, 1010

(7th Cir.2000) ("We know that §2255's period of limitation is not jurisdictional but is instead a procedural statute of limitations subject to equitable tolling.") (citing *Taliani*).

The uniformity of decisions reflects the nature of the writ. The discretion to toll the statute of limitations in habeas corpus cases is justified because habeas is, at its core, an equitable remedy for constitutional violations. *Schlup v. Delo*, 513 U.S. 298, 319 (1995) ("the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy"); *Withrow v. Williams,* 507 U.S. 680, 699 (1993) ("[c]oncerns for equity . . . resonate throughout our habeas jurisprudence."); *Kuhlmann v. Wilson,* 477 U.S. 436, 447 (1986) ("[i]n decisions of the past two or three decades, . . . the Court has reaffirmed that 'habeas corpus has traditionally been regarded as governed by equitable principles'") (citations omitted).

It cannot be said that Congress, cognizant of these precedents, silently abrogated the power of the federal courts to consider extraordinary circumstances that prevented the timely filing of habeas corpus petitions. *Cf. Clay v. United States*, 537 U.S. 522, 527 (2003) ("'we presume that Congress expects its statutes to be read in conformity with this Court's precedents'") (quoting *United States v. Wells*, 519 U.S. 582, 495 (1997))). Congress surely recognized the necessity that federal courts retain their equitable authority to consider extraordinary circumstances that prevented timely filing of a habeas petition. This holds especially true given the brief period of time in which prisoners must act.

Petitioner's reliance on *United States v. Brockamp*, 519 U.S. 347 (1997), is misplaced. In *Brockamp,* this Court found that the statutory time and amount limitations of a section of the Internal Revenue Code could not be equitably tolled. The *Brockamp* decision noted that Congress evinced no legislative intent to create equitable exceptions given that "[t]ax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities." *Id.* at 352.

In contrast to the tax system at issue in *Brockamp*, this Court has consistently reaffirmed the equitable nature of the writ of habeas corpus. Given this distinct jurisprudence, *Brockamp* has nothing to say about the federal judicial authority in reviewing criminal convictions and sentences.

For similar reasons, *United States v. Beggerly*, 524 U.S. 33 (1998), governing lawsuits under the Quite Title Act, has nothing to say about equitable power in habeas corpus cases. In *Beggerly*, this Court rejected equitable tolling under the Quiet Title Act because the Act "has already effectively allowed for equitable tolling" and also because "the unusually generous nature of the QTA's limitations time period [makes] extension of the statutory period by additional equitable tolling . . . unwarranted." *Id.* at 48-49. In contrast, the one-year filing period under 28 U.S.C. §2244(d), is not generous. *See Williams v. Sims*, 390 F.3d 958, 960 (7th Cir. 2004) (characterizing § 2244(d) as a short limitations period).

Finally, in *Beggerly*, this Court found that additional "[e]quitable tolling of the already generous statute of limitations incorporated in the QTA would disadvantage landowners by "throw[ing] a cloud of uncertainty over th[eir] rights[.]" 524 U.S. at 48. No such considerations are present in habeas corpus cases.

C. The Equitable Nature of Habeas Authority Requires Assessment of Individual Cases.

In an Amicus Curiae brief filed in this Court by several states, amici noted that, nationwide there has been a large volume of litigation on equitable tolling issues and argued that such litigation "has become increasingly burdensome to the states and the judiciary." Brief *Amici Curiae* of thirty-two states, in support of petitioner in *Belleque v. Kephart*, Supreme Court No. 06-1015, p. 15 (dated Feb. 23, 2007). Given the equitable nature of the writ, however, federal courts must retain their authority to evaluate claims of extraordinary circumstances outside of the prisoner's control. Clearly, states should not be able to rely on their own wrongdoing to preclude the federal courts from considering exceptional circumstances that prevent an incarcerated person from filing his petition on time. *See, e.g., King v. Bell*, 378 F.3d 550, 553-54 (6th Cir. 2004) (equitable tolling warranted because "government's failure to produce the *voir dire* transcripts prevented [petitioner] from complying with court's original scheduling order"). Tolling must also remain available when tardiness is directly attributable to an otherwise diligent prisoner's mental incompetency or the extreme neglect or malfeasance of one's lawyer. *See, e.g., Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003) ("Where a habeas petitioner's mental

incompetence in fact caused him to fail to meet the AEDPA filing deadline, his delay was caused by an 'extraordinary circumstance beyond [his] control,' and the deadline should be equitably tolled"); *United States v. Martin*, 408 F.3d 1089, 1096 (8th Cir. 2005) (granting equitable tolling because retained counsel "misrepresented the law, misrepresented the status of Martin's case, and retained possession of documents that were crucial to Martin's claim").

II. THE NINTH CIRCUIT'S STANDARD FOR EQUITABLE TOLLING IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

In seeking certiorari, petitioner argues that "[t]he Ninth Circuit has set the bar that must be cleared to obtain an evidentiary hearing much too low." (Cert. Petition, p. 23) *Dietrich*, of course, is an unpublished decision which cannot be cited as precedent. (*See* App. 11) (citing 9th Cir. R. 36-3). Hence, the decision has not set any bars.

To make its case for certiorari, petitioner, therefore, relies on a *different* decision by the Ninth Circuit, *to wit*: *Roy v. Lampert*, 455 F.3d 945, *amended*, 465 F.3d 964 (9th Cir. 2006). *Roy*, however, is not the leading case on equitable tolling. In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), this Court discussed the standard for equitable tolling.[2] To invoke this doctrine, a habeas litigant must demonstrate (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Id.* at 418. Well before the *Pace* decision, the Ninth Circuit's decisions have been entirely faithful to this

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[2] In *Pace*, this Court assumed, without deciding, that equitable tolling is available under the Antiterrorism and Effective Death Penalty Act. 544 U.S. at 418 n.8.

standard. *See Calderon v. U.S. District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) (*overruled on other grounds*). The Circuit emphasizes that equitable tolling is "unavailable in most cases." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). "Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.'" *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002). The *Roy* Court only allowed two Oregon prisoners, who had been sent to a private prison in Arizona, to present evidence in support of their equitable tolling claims.

In *Roy*, the respondent-prisoner (named Kephart), recently filed a Brief in Opposition to Petition For Certiorari, *Belleque v. Kephart*, Supreme Court No. 06-1015, p. 15 (filed February 23, 2007). In that brief, the respondent demonstrated that courts within the Ninth Circuit strictly enforce the timetable mandated by 28 U.S.C. § 2244(d). Moreover, the brief further demonstrated that evidentiary hearings on equitable tolling are rare within the Ninth Circuit. Thus, petitioner's argument, as well as his prediction of excessive evidentiary hearings are simply wrong.

CONCLUSION

Petitioner has not presented any compelling reason for this Court to grant the petition. Respondent respectfully requests that the petition be denied.

DATED this 2nd day of March, 2007.

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